United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21,532

JAMES R. TAYLOR, Appellant

v.

United States of America, Appellee

Appeal from Judgment of the
United States District Court for the District of Columbia

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July 14, 1969

I N D E X

AUTHORITIES

* Cases or authorities chiefly relied upon are ma rked by asterisks.

ISSUES PRESENTED FOR REVIEW

I.

Whether appellant was denied due process of law under the Fifth Amendment as a result of the in-court identifications.

a. Whether the confrontations herein were so unnecessarily suggestive and conducive to irreparable mistaken identification that appellant was denied due process of law under the Fifth Amendment.

b. Whether the subsequent in-court identification testimony stemmed from and was tainted by the unnecessarily suggestive confrontations.

II.

Whether appellant was denied due process of law under the Fifth Amendment as a result of the in-court testimony regarding statements made during an unnecessarily suggestive confrontation.

III.

Whether the trial judge erred in refusing to provide appellant with a transcript of the proceedings in the first trial in this case so that witnesses could be effectively cross-examined during the second trial.

a. Whether appellant's Sixth Amendment right to confront witnesses was denied by this refusal.

b. Whether the refusal constituted a violation of appellant's right to be adequately represented by counsel under 35 U.S.C. §3006A (e) (1964).

IV.

Whether the trial judge erred by admitting the prejudicial testimony of Harold Sullivan which was irrelevant, immaterial and constituted hearsay.

V.

Whether the trial judge erred in refusing to provide appellant with a transcript of the grand jury proceedings which related to this case and to the testimony of certain witnesses herein.

a. Whether such refusal constituted a denial of appellant's Sixth Amendment right to confront witnesses.

b. Whether the testimony of Harold Sullivan concerning such grand jury proceedings "opened the door" for discovery of the transcript thereof.

VI.

Whether the trial judge erred in admitting the prejudicial testimony of Clarence MacFarland which was not only incredible and unreliable but included irrelevant evidence which tended to

prove crimes committed by appellant other than those charged herein.

VII.

Whether the trial judge erred in admitting the immaterial and prejudicial testimony of Lafayette Mavritte, Jr.

VIII.

Whether the trial judge erred in permitting the prosecutor to include erroneous and improper statements in his closing argument.

THIS CASE HAS NOT PREVIOUSLY BEEN BEFORE THIS COURT UNDER THIS OR ANY OTHER TITLE.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,532

JAMES R. TAYLOR, Appellant

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States
District Court for the District
of Columbia

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Columbia entered October 6, 1967, convicting appellant of robbery, from another, of personal property belonging to the United States in violation of Title 18, Sections 641 and 2112 of the United States Code; assault with a dangerous weapon in violation of Title 22, Section 502, of the District of Columbia Code; and carrying a dangerous weapon in violation of Title 22, Section 3204 of the District of Columbia Code.

Appeal was noted and appellant was granted leave to proceed on appeal without prepayment of costs and with appointed counsel on December 1, 1967.

Jurisdiction of this Court is founded upon Title 28, United States Code, Section 1291.

REFERENCES TO RULINGS

The trial court made rulings on pertinent issues at the following pages in the Transcript:

4/26/67	2(f), 36 & 38
5/4/67	1006
7/18/67	17
7/19/67	59, 65, 66, 74, 79, 123, 124
7/20/67	143, 144, 173, 174, 253, 263, 265, 376
7/24/67	12, 20, 45, 52, 104
7/25/67	217-220 & 233
7/27/67	297
8/2/67, Vol. I	6

STATEMENT OF THE CASE

Appellant, James Taylor, and co-appellant, Alvin Green were originally indicted on July 8, 1966 for unauthorized use of a vehicle; robbery from another of personal property belonging to the United States; stealing and purloining property belonging to the United States of America; and assault with a dangerous weapon, against Marjorie Storey, Mary Meyers and Marion Bedwell. In addition, appellant Taylor was indicted for carrying a dangerous weapon without a license.

Appellant Taylor and co-appellant Green were brought to trial before the United States District Court for the District of Columbia in a proceeding commencing on April 24, 1967. During this proceeding, on May 4, 1967, the Court directed a judgment of acquittal on the count of unauthorized use of a motor vehicle. On May 5, 1967 this first trial ended in mistrial as to all other counts when the jury reported that they were unable to reach a verdict.

On July 18, 1967, Taylor and Green were once again brought to trial before the United States District Court for the District of Columbia. In its charge, the court did not instruct the jury on the count of stealing and purloining property belonging to the United States of America. On August 2, 1967 the jury

returned a verdict of guilty against both Taylor and Green on the robbery count and on all three counts of assault with a dangerous weapon. In addition, a verdict of guilty was returned against Taylor on the count of carrying a dangerous weapon without a license. Appellant Taylor was sentenced to a term of 3 to 9 years on the robbery and assault counts and to a term of 1 year on the count of carrying a dangerous weapon, this latter sentence to run consecutively with the 3 to 9 year sentence.

BACKGROUND FACTS

The record indicates that on November 2, 1965, at about 9:05 A.M., two men entered the Cashier's Office at St. Elizabeth's Hospital and robbed the same of approximately $6,800.00 in money belonging to The United States of America. One of the men vaulted the counter while the other remained on the other side of the counter and held a pistol pointed generally over the counter in the direction of the witnesses Mary Meyers, Marian Bedwell and Marjorie Storey who were present in the Cashier's Office at the time of the robbery. Bedwell and Storey were directed to lie down on the floor while Meyers was directed to assist in opening and emptying the cash drawers into a bag held by the man who vaulted the counter. Meyers was then told to lie down and the man with the bag revaulted the counter.

(Tr. 7/19/67, pp. 57-58). Only moments after the robbery began, both men had left the Cashier's Office.

On November 3, 1965, witnesses Meyers and Storey were interviewed by F. B. I. Agent Raymond J. Young (Tr. 7/26/67, pp. 181-191). During this interview, Young showed Meyers and Storey photographs of James Stanley Brown and Clarence MacFarland. At this time, Meyers and Storey each stated that the photograph of MacFarland resembled the man who vaulted the counter, but neither was able to make a positive identification (Tr. 7/26/67, p. 190). Meyers and Storey each also stated that the photograph of James Stanley Brown resembled the individual holding the gun during the robbery but again neither was able to make a positive identification. (Tr. 7/26/67, pp. 184 and 187). Storey went on to state that the photograph of James Stanley Brown resembled the man holding the gun "around the eyes". (Tr. 7/26/67, p. 187). In spite of this tentative identification, James Stanley Brown was never either charged or arrested in connection with this crime. (Tr. 7/26/67, pp. 184-185).

On December 16, 1965, Clarence W. MacFarland was incarcerated in connection with another offense and (Tr. 7/21/67, p. 355 and Government Exhibit 3 (b)) was interviewed at the D. C. Jail by F. B. I. Agent Meder and Detectives Linn and Fallin. At that time MacFarland denied participation in the St. Elizabeth's robbery but said he knew who did it and that he would talk if

transferred to the Marshall's Lockup at the U.S. Court House (Government Exhibit 3(a)). On this same day both Mrs. Meyers and Mrs. Storey viewed a lineup which included MacFarland (Tr. 7/19/67, p. 71). Mrs. Storey stated that while she was certain she had seen MacFarland before, she was not sure whether it was because she had seen photographs of him, or had actually seen him during the robbery (Government Exhibit No. 2, Meder's report of the 12/22/65 interview with Mrs. Storey).

On December 21, 1965, MacFarland was again interviewed by Meder, Linn and Fallin at the Marshall's Lockup. At this time MacFarland stated that he, Alvin Green and James Taylor had committed the St. Elizabeth's robbery. In addition, MacFarland implicated Joseph Leroy Newman as being involved in planning the robbery. (Government Exhibit 3).

On December 22, 1965, in an interview with Meder, the witnesses Storey and Meyers were shown photographs of MacFarland, Green, Taylor and Newman. They also were shown a silver plated .38 caliber Smith and Wesson revolver which had been taken from MacFarland. At the time of this interview, Mrs. Storey was UNABLE to make a positive identification of any of the individuals; however, she stated that the gun was similar in appearance to the gun used by the robbers. (Govern-

ment Exhibit No. 2, Meder's report of the 12/22/65 interview with Mrs. Storey.) Mrs. Meyers was UNABLE to positively identify the photographs of Green, Newman and MacFarland. However, she stated that the gun was similar in appearance to the gun utilized in the robbery. Further, Mrs. Meyers also was UNABLE to positively identify the photograph of Taylor, although she did state that she might be able to make a positive identification or definitely eliminate Taylor if she were to see him in person (Government Exhibit No. 1, Meder's report of the 12/22/65 interview with Mrs. Meyers). In spite of this statement, appellant Taylor never was exhibited to Mrs. Meyers in a fairly conducted lineup, or otherwise, during the next 16 months or so prior to the beginning of the first trial (Tr. 7/19/67, pp. 60, 61 & 71). In this regard it should be noted the appellant Taylor was incarcerated on November 29, 1965 to begin serving a 1 to 3 year sentence imposed in Criminal No. 468-65 and has been continuously incarcerated ever since.

On January 4, 1966, MacFarland testified live before a grand jury and at that time implicated appellant Taylor, co-appellant Green, Joseph Newman and himself as being involved in the St. Elizabeth's robbery (Defendant's Exhibit No. 1). Additionally, MacFarland testified concerning a great number of other crimes where he had been directly or indirectly involved

(Tr. 7/24/67, pp. 10-11). This grand jury did not return an indictment in the St. Elizabeth's robbery, but later MacFarland's statement was read to a second grand jury (Tr. 7/24/67, pp. 37-39) which indicted appellant Taylor and co-appellant Green on July 8, 1966.

On April 21, 1967, after this case had been set for trial on the ready calendar, appellant Taylor caused a subpeona to be issued to the Clerk of the District Court of General Sessions, to testify in the case and to bring all records concerning case No. 8671-65. This testimony was needed to help prove appellant Taylor's alibi to the effect that he was in court at the time of the robbery. At about the same time, at the request of the prosecutor, Meder had another interview with MacFarland (Government Exhibit No. 3 (c)) at which time, MacFarland changed his story. During the December 21, 1965 interview, MacFarland had stated that during the robbery a metal cash box was taken out of the vault and was placed in a pillow case and the entire box was taken to Taylor's house. Then, MacFarland went on to state, "I do not know what happened to the metal cash box since I WAS THE FIRST ONE TO LEAVE Taylor's apartment". (Government Exhibit No. 3, p. 5). Then, some sixteen months later, and only after the government became

aware that Taylor had in fact been in court on November 2, 1965, Mac Farland was interviewed again and for the first time related a story concerning how Taylor called his bondsman from his apartment, left at 9:50 A.M. and returned at about 11:00 A.M. while MacFarland remained at Taylor's apartment (Government Exhibit No. 3(c)). MacFarland then stated that he had not included this information in his December 21, 1965 statement because he had not recalled these incidents.

On April 24, 1967 at the beginning of the first trial, appellant Taylor was brought into the courtroom in the custody of a deputy marshall while the identification witnesses Meyers and Storey were seated in the courtroom along with other witnesses (Tr. 7/19/67, pp. 61-67 and 7/20/67, pp. 166-168). At the trial Mrs. Meyers was permitted to make an in-court identification of Taylor (Tr. 7/19/67, p. 84) and Mrs. Storey was permitted to testify as to the resemblance between Taylor and the robber (Tr. 7/20/67, pp. 143-144). In addition to their in-court identifications of appellant, both Mrs. Storey and Mrs. Meyers were also permitted to testify regarding the showing of photographs (Tr. 7/19/67, pp. 124-125 and 7/20/67, pp. 172-175).

Prior to Mrs. Meyer's in-court identification and upon

objection by counsel, a hearing was held with the jury excused (Tr. 7/19/67, pp. 60-83), evidently to determine whether or not appellant's due process rights would be violated by Mrs. Meyers' in-court identification. Counsel were confused as to the retroactive effect of Stovall v. Denno, 388 U.S. 293, 18 L. Ed. 2d 1199 (1967) and as to whether or not United States v. Wade, 388 U.S. 218, 18 L. Ed. 2d 1149 (1967) and Gilbert v. California, 388 U.S. 263, 18 L. Ed. 2d 1178 (1967) were applicable (Tr. 7/19/67, pp. 59 and 64). This hearing involved only the testimony of Mrs. Meyers and Detective Fallin and dealt primarily with the lineup viewed by Mrs. Meyers which did not include appellant Taylor (Tr. 7/19/67, p. 72). Also discussed were certain aspects of the courtroom confrontation at the beginning of the trial (Tr. 7/19/67, pp. 61-68), and certain aspects of the showing of photographs of the accused (Tr. 7/19/67, pp. 72-80). The hearing did not include testimony from Mrs. Storey or from F.B.I. Agents Meder and Young who also had shown photographs of suspects to the witnesses. In fact, it was necessary to refresh Fallin's recollection by reading a statement prepared by F.B.I. Agent Meder (Compare Tr. 7/19/67, p. 80 and Government Exhibit No. 1). Further, the court stated emphatically that he was "not going to have the jury leave for the other two too" (Tr. 7/19/67, p. 74), indicating

that this hearing was sufficient.

During her testimony in the second trial, Mrs. Meyers denied (Tr. 7/19/67, pp. 110-116) having testified in the first trial that during the robbery appellant Taylor "took his hat and placed it back and forth over his face" (Tr. 4/25/67, p. 4). Also, she conveniently forgot that during the interview of November 3, 1965 she had tentatively identified James Stanley Brown as the man with the gun (Compare Tr. 7/19/67, pp. 116-118 and Tr. 7/26/67, pp. 183-184). On the other hand, Mrs. Storey very fairly admitted that she was unable to make a positive, in-court identification because the man with the gun "kept his hat moving in front of his face" and therefore she only got a view of his eyes (Tr. 7/20/67, p. 158).

Clarence W. MacFarland was the chief witness for the government and testified at great length concerning the planning of the robbery (Tr. 7/20/67, pp. 276-283). He testified further that on November 1, 1965, he, Taylor, Green and Newman went to St. Elizabeth's Hospital with the intention of robbing the same, but that when Newman was recognized by an acquaintance, the robbery was called off (Tr. 7/20/67, pp. 262-267). MacFarland then testified that on November 2, 1965, he, Green and Taylor robbed St. Elizabeth's Hospital (Tr. 7/20/67, pp. 267-272). MacFarland identified himself as the man who vaulted the counter and Taylor

as the man holding the gun. (Tr. 7/20/67, p. 271).

The testimony of MacFarland was attacked on cross-examination, primarily on the basis of being untrustworthy because it was obtained in exchange for certain promises made by the government and because MacFarland was an admitted perjurer unworthy of belief. For example, MacFarland admitted having lied to the grand jury during the investigation of the Giant Food Robbery (Tr. 7/24/67, p. 111). Yet, MacFarland was permitted to discuss the fact that the group had stolen an automobile for purposes of the robbery (Tr. 7/20/67, pp. 262, 264 and 265) in spite of the fact that appellant had been acquitted of that charge in the first trial. Also MacFarland testified that he had been "involved with different robberies with these two fellows (Taylor and Green) and some more fellows" (Tr. 7/20/67, p. 277).

In the middle of MacFarland's testimony, Harold Sullivan (an assistant United States attorney who had been chief of the grand jury section during the MacFarland affair) was called as a witness for the Government (Tr. 7/24/67, p. 9). The main thrust of Sullivan's direct testimony was to assert that no substantial promises were made to MacFarland in consideration for his testimony (Tr. 7/24/67, p. 14). Further, Sullivan testified that no persuasion had been used to prevent indictment of Mac-

Farland by the grand jury (Tr. 7/24/67, p. 27). In addition, Sullivan discussed grand jury proceedings generally and the entirety of MacFarland's testimony before the grand jury, including the fact that MacFarland's testimony had produced a number of indictments against persons other than MacFarland (Tr. 7/24/67, pp. 10-13). Later, F.B.I. Agent Meder was called by the government to testify that no substantial promises had been made to MacFarland (Tr. 7/24/67, p. 136).

Appellant Taylor called Joseph Newman as a witness. Newman testified that while he occasionally visited St. Elizabeth's Hospital to meet with friends, he did not specifically remember whether or not he had been there on November 1, 1965 (Tr. 7/26/67, p. 204). Taylor also called attorney John Shorter who testified that he had been in court with Taylor on November 2, 1965 at about 10:00 A.M. (Tr. 7/26/67, p. 117). During Shorter's testimony, it was suggested that Shorter may have discussed the St. Elizabeth's case with MacFarland (he represented MacFarland at the time) and may have told MacFarland that since Taylor was in court with Shorter, Taylor couldn't have committed the St. Elizabeth's robbery (Tr. 7/26/67, pp. 122-125). The testimony in this regard was not clear because Shorter couldn't remember (Tr. 7/26/67, p. 122) and in addition an attorney-client privilege was involved (Tr. 7/26/67, pp. 125-126).

Virgil Hood, Taylor's employer, was called by Taylor to prove that Taylor had worked on November 1, 1965. Hood never was able to state positively that Taylor worked that day; however, on cross-examination the prosecutor attempted to impeach Mr. Hood because Hood had previously been indicted for certain felonies (Tr. 7/27/67, p. 296) although he had never been convicted of the crimes for which he was indicted (Tr. 7/27/67, p. 314). Mr. Hood testified that Mr. Caputy, the prosecutor in this case, might harbor ill feelings toward him as evidenced by the fact that Caputy had called Mr. Hood's boss (John Layton) while Hood was a policeman, to complain that Hood was occasionally late for appearances in court (Tr. 7/27/67, pp. 317-325).

Lafayette Mavritte, Jr. was called by the prosecution as a rebuttal witness, obstensively for the purpose of impeaching the testimony of Newman. Mavritte testified that he had seen Newman at St. Elizabeth's Hospital on November 1, 1965 (Tr. 8/2/67, pp. 5-7).

On several occasions during the trial, either the appellant Taylor himself, or his counsel requested that they be provided with a transcript of the first trial so that cross-examination of witnesses could be conducted effectively (Tr. 7/20/67, pp. 252-254: 7/24/67, pp. 52 and 176-179; and 7/25/67, pp. 218-219).

These requests were all denied in spite of the fact that appellant was without funds with which to purchase the transcript (Tr. 7/20/67, p. 253 and 4/26/67, pp. 38-39).

RULE INVOLVED

Federal Rules of Criminal Procedure

Rule 52. Harmless Error and Plain Error

* * * *

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATUTE INVOLVED

Title 18 United States Code - Crimes and Criminal Procedure

18 U.S.C. §3006A. Adequate representation of defendants.

* * * * * *

(e) Services other than counsel. - Counsel for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in his case may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel to obtain the services on behalf of the defendant. The court may, in the interests of justice, and upon a finding that timely procurement of necessary services could not await prior authorization, ratify such services after they have been obtained. The court shall determine reasonable compensation for the services and direct payment to the organization or person who rendered them upon the filing of a claim for compensation supported by an affidavit specifying the time expended, services rendered, and expenses incurred on behalf of the defendant, and the compensation received in the same case or for the same services from any other source. The compensation to be paid to a person for such service rendered by him to a defendant under this subsection, or to be paid to an organization for such services rendered by an employee thereof, shall not exceed $300, exclusive of reimbursement for expenses reasonably incurred.

STATEMENT OF POINTS

1. Appellant Taylor was denied due process of law under the Fifth Amendment because the in-court identifications of appellant by the witnesses Meyers and Storey stemmed from prior confrontations and or showings of photographs which were unnecessarily suggestive and conducive to irreparable mistaken identification.

2. Appellant Taylor was denied due process of law under the Fifth Amendment because the witnesses Meyers and Storey testified as to the tentative identification of the appellant made at the time of the unnecessarily suggestive showing of photographs.

3. The trial judge erred in not providing appellant with a transcript of the proceedings in the first trial in this case so that witnesses could be effectively cross-examined in the second trial. Thus, appellant was denied the right to confront witnesses under the Sixth Amendment and the right to be adequately represented under 35 U.S.C. 3006A (e).

4. The trial judge erred in admitting the prejudicial,

immaterial, irrelevant, hearsay testimony of Harold Sullivan over timely objection thereto by appellants counsel.

5. The trial judge erred in refusing to provide appellant with a transcript of the entirety of the grand jury proceedings relating to this case and to the testimony of certain witnesses herein. In particular this refusal constituted a denial of appellant's Sixth Amendment right to confront witnesses with effective cross-examination. Further, appellant became entitled to discover this information after Harold Sullivan testified as to grand jury procedures generally and as to the entirety of the proceedings involving Clarence MacFarland's various affairs.

6. It was plain error for the trial judge to admit the incredible and unreliable testimony of Clarence MacFarland. Further, the trial judge erred in admitting testimony of MacFarland which tended to implicate appellant in crimes other than those for which he was charged herein.

7. The trial judge erred in admitting the immaterial and prejudicial testimony of Lafayette Mavritte, Jr. over timely objection by counsel for appellant.

8. The trial judge erred in permitting the clearly, erroneous and improper closing argument by the prosecutor.

ARGUMENT I*

THE IN-COURT IDENTIFICATIONS WERE IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant was denied the Due Process of Law guaranteed by the Fifth Amendment in that the in-court identification of appellant by the witnesses Meyers and Storey stemmed either from a prior confrontation or a showing of photographs (or from the cumulative effect of both), said confrontation and said showing of photographs each being unnecessarily suggestive and conducive to irreparable, mistaken identification. Further, it is manifest by the record that the prosecution failed to carry its burden of establishing by "clear and convincing evidence" that the identification testimony of the witnesses Meyers and Storey stemmed from a source other than and were untainted by the highly prejudicial and unnecessarily suggestive confrontation or showing of photographs.

In Stovall v. Denno, 1/ the United States Supreme Court recognized the proposition that a confrontation between a witness

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1/ 388 U.S. 293, 18 L. Ed. 2d 1199 (1967).

* The court's attention is specifically directed to Government Exhibits Nos. 1, 2, 3 and 3(b) and to Transcript pages as follows: 4/25/67, p. 4; 5/5/67, pp. 3-6; 7/18/67, pp. 3-17; 7/19/67, pp. 58-125; 7/20/67, pp. 143, 144, 158, 166-168, 172-174 & 180; 7/24/67, p. 162; 7/25/67, pp. 194, 195; 7/26/67, pp. 183-190; and 7/27/67, pp. 232 & 233.

and a suspect may be "so unnecessarily suggestive and conducive to irreparable mistaken identification that he [is] denied due process of law." In Simmons v. United States, [2] the United States Supreme Court extended this proposition by recognizing that photographic identification procedures may be "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." In both the Stovall case and the Simmons case, the court emphasizes that a determination of whether or not a due process violation has occurred requires an evaluation of the "totality of the circumstances". In structuring such an evaluation, this court stated in Gregory v. United States, [3] that the inquiry should be focused upon three distinct questions:

(1) Was the challenged confrontation suggestive?

(2) If so, was the suggestive confrontation unnecessary?

(3) If the confrontation was unnecessarily suggestive, does it so taint the testimony relating to the out-of-court and in-court identifications as to required reversal of the conviction?

2/ 390 U.S. 377, 19 L. Ed. 2d 1247 (1968).

3/ ___ U.S. App. D.C. ___, ___ F. 2d ___, No. 21,089, Slip Op. (March 18, 1969).

At the beginning of the first trial in this case, appellant was brought into the courtroom in the custody of another person and was seated at the defense table while all the witnesses were seated together in the courtroom. The witnesses Storey and Meyers each observed this activity.[4/] Surely this confrontation between appellant and the witnesses was suggestive and conducive to irreparable, mistaken identification. Manifestly, at the time of the confrontation the witnesses must have been aware that appellant was considered by the authorities as having committed the robbery (the fact of the trial speaks for this). Further, Mrs. Storey testified that she saw appellant walk through the courtroom door and exclaimed at that time, for all to hear, "he resembles the man".[5/] THIS COURTROOM CONFRONTATION WAS UNDENIABLY SUGGESTIVE.

The courtroom confrontation was not only suggestive, but it was also unnecessary. The confrontation took place on the first day of the first trial[6/] in this case (April 24, 1967) more than seventeen months

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4/ Transcript of the Proceedings before the United States District Court for the District of Columbia in United States of America v. Alvin Green and James Taylor, Criminal No. 860-66 (Hereinafter referred to as "Tr.". Because a number of different reporters were utilized, the pagination of the various volumes is not continuous and therefore a date is necessary to completely identify the pages.) 7/19/67, pp. 61-67 and 7/20/67, pp. 166-168.

5/ Tr. 7/20/67, p. 167.

6/ The first trial, which started on April 24, 1967, ended on May 5, 1967 when the Court declared a mistrial after being informed by the jury that they were hopelessly divided and therefore unable to reach a verdict. See Tr. 5/5/67, pp. 3-6.

after the robbery which occurred on November 2, 1965. There is no evidence that during this period of time, appellant was afforded the protection of a fairly conducted lineup designed to properly test the recollection of the witnesses.[7] Arrangement of such a lineup would not have been difficult since appellant was implicated as early as December 21, 1965,[8] and he was already in custody at that time charged with another offense.[9] Further, he has been incarcerated continuously ever since.

In the case of Russell v. United States,[10] this court stated:

> "Stovall v. Denno did not erect a due process barrier against all unreliable identifications, it requires exclusion only of evidence which could and should have been obtained by procedures less conducive to unreliability."
> 408 F. 2d at 1285. (Emphasis supplied)

Certainly, the suggestive effect of the courtroom confrontation could have and should have been avoided simply by providing appellant with the protection of a fairly conducted lineup. Then, at least, it could fairly be urged that the in-court identification stemmed from a source independent of the unnecessarily suggestive courtroom confrontation.

7/ Mrs. Meyers testified (Tr. 7/19/67, p. 61) that the very next time she saw appellant after the robbery was "when we came to trial here."

8/ Government Exhibits Nos. 3 and 3(b). Also see Tr. 7/24/67, p. 162.

9/ Appellant was incarcerated on November 29, 1965 to begin serving sentence after conviction in Criminal No. 468-65.

10/ ___ U.S. App. D.C. ___, 408 F. 2d 1280 (1969).

Particularly, this is true in this case where neither of the witnesses were able to make clear identification from photographs shown to them prior to trial and in fact, each actually picked out the photograph of another person before they saw a photograph of appellant.[11] Then, even after seeing a photograph of appellant under suggestive circumstances,[12] neither witness was able to make a positive identification. While the witnesses were not able to positively state after seeing the photograph of appellant that he was involved, there is no question but that the in-court identification could have stemmed from the memory of the photograph. In fact, Mrs. Storey's in-court identification was not even positive, but rather was only to the effect that appellant resembled the robber.[13]

Both Mrs. Meyers and Mrs. Storey were shown photographs of appellant under highly suggestive circumstances. In an interview which apparently took place on December 22, 1965, both witnesses were shown photographs of the four persons alleged to be implicated in one way or another with the robbery.[14] This interview was conducted by

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11/ Tr. 7/26/67, pp. 183-187.

12/ Tr. 7/19/67, p. 125 and 7/20/67, p. 174.

13/ Tr. 7/20/67, pp. 143-144.

14/ Government Exhibit No. 1 (Which includes Meder's record of the 12/22/65 interview of Mrs. Meyers) and Government Exhibit No. 2 (Which includes Meder's record of the 12/22/65 interview of Mrs. Storey). (Each of these Exhibits includes three separate documents: (1) Meder's record of an interview of 11/2/65 with the witness; (2) Meder's record of an interview of 12/22/65 with the witness; and (3) Young's record of an interview of 11/4/65 with the witness). Also see Tr. 7/25/67, pp. 194-195.

F. B. I. Agent Meder shortly after MacFarland had confessed his participation in the St. Elizabeth's robbery and had implicated the others.[15] Prior to the interview, both Mrs. Storey and Mrs. Meyers already tentatively identified a photograph of MacFarland.[16] Also, each had viewed a lineup which included MacFarland prior to the showing of photographs.[17] Then, at the interview, Mrs. Storey stated that while she was certain she had seen MacFarland previously, she wasn't sure whether it was because she had seen photographs of him, or had actually seen him during the robbery. Also during the interview, at the same time Storey and Meyers viewed the photographs of appellant and the other suspects, they were also shown a silver plated .38 caliber Smith and Wesson revolver and each witness stated that the gun was similar to the gun used during the robbery.[18] Apparently Meyers and Storey were together during this interview since Meder's reports are similarly worded and dated.

The record is silent as to whether or not the witnesses were shown other photographs at the same time and the complete circumstances of the showing are not clear; however, the few facts which are known clearly indicate that the showing of photographs was highly

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15/ Government Exhibit No. 3 which includes MacFarland's confession dated 12/21/65. Also see Tr. 7/24/67, p. 162.
16/ Tr. 7/26/67, pp. 189-190.
17/ Tr. 7/19/67, pp. 71-72.
18/ Supra, note 14.

suggestive. Clearly, the implication was given that the gun came from one of the four and that the four people (one of whom had already been tentatively identified by these same witnesses) had been connected with the crime. This surely is at least as suggestive as the viewing of the automobile in Wright v. United States.[19] /

There was no necessity for the highly suggestive showing of the photograph of appellant. The confession of MacFarland provided adequate grounds for arresting those implicated. In fact, the confession apparently provided the sole grounds for the indictment. Further, appellant was incarcerated on November 29, 1965 for another offense[20] / and was in custody at the time of the showing of the photographs. Thus, a need to quickly arrest or clear the appellant was not present. There was no reason why a fair lineup could not have been arranged and therefore there was absolutely no justification for the highly suggestive showing of photographs.

Both the courtroom confrontation and the showing of the photographs were unnecessarily suggestive and, further, they were conducive to irreparable mistaken identification. In arriving at this conclusion, the following factors are important:

(1) The only identification in this case which was based on

19/ ___ U.S. App. D.C. ___, 404 F. 2d 1256 (1968).
20/ Supra, note 9.

fresh recollection was an apparently erroneous identification of James Stanley Brown as the "individual holding the gun".[21] It is to be noted that this is the exact part for which appellant has been convicted of playing. The first tentative identification of a photograph of appellant as resembling the man with the gun came on December 22, 1967, some 50 days or so after the robbery. The first and only positive identification of appellant (other than by the asserted accomplice) came during the first trial, approximately seventeen months after the robbery.

(2) None of the witnesses had a prior acquaintance with appellant.

(3) While the opportunity to observe under conditions of good lighting appear to have been adequate, it should be noted that only one (Meyers) of the three witnesses (Meyers, Storey and Bedwell) was able to make a positive identification of appellant and not one of the witnesses was able to positively identify both appellant and MacFarland. Further, Mrs. Meyers was busy during the robbery getting the loot out of the safe and placing it in the bag held by MacFarland.[22]

(4) Both pretrial confrontations were unnecessarily suggestive

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21/ Supra, note 11.
22/ Tr. 7/19/67, pp. 104-107.

as discussed above.

(5) Both Mrs. Storey and Mrs. Meyers were victims of the crime whereby their "understandable outrage may (have excited) vengeful or spiteful motives".[23/]

(6) Mrs. Storey was never able to make a positive identification. Mrs. Meyers did make a positive identification to which she stubbornly stuck during cross-examination. However, as pointed out in Gregory,[24/] and as indicated by the record in this case, this was the result of her obduracy rather than her reliability. Significantly, she was just as obdurate in denying that she made certain statements in the first trial when the record establishes that in fact she had made the very statements in question.[25/] Further, she very conveniently forgot about having made a tentative identification of the photograph of Brown.[26/] It is obvious, from Mrs. Meyers testimony as a whole and the manner in which she interjects sarcasm and non-responsive statements that she does not at all take kindly to the cross-examination.[27/] Indeed she appears to have approached her testimony on cross-examination primarily as an argument between herself and defendant's counsel rather than

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23/ Supra, note 3, Slip Op. at p. 12.
24/ Supra, note 3.
25/ Tr. 7/19/67, pp. 110-116, and 4/25/67, p. 4.
26/ Tr. 7/19/67, pp. 116-118. Compare Tr. 7/26/67, pp. 183-184.
27/ Tr. 7/19/67, pp. 61-67 and 85-121.

a serious search for the truth.[28]

(7) Appellant's counsel was not afforded proper opportunity to question either Mrs. Storey or Mrs. Meyers with regard to probing the circumstances surrounding their identification testimony and particularly concerning the suggestive showing of the photographs. This trial took place shortly after Stovall[29] was decided and prior to the decision in Simmons[30] and the necessity for a full scale investigation of due process factors did not appear to be necessary to the court below. Only Mrs. Meyers and Detective Sergeant Fallin were questioned out of the presence of the jury as to due process factors surrounding the identification testimony.[31]

Although Fallin stated that he showed a considerable number of photographs to the witnesses he evidently did not make a report since no such report was produced by the government. The reports produced[32] were prepared by F.B.I. Agents Meder and Young. A proper hearing to determine whether or not appellant had been denied due process by the confrontation and the showing of photographs surely

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28/ For example see Tr. 7/19/67, p. 64 where, in response to cross-examination by counsel for appellant regarding the courtroom confrontation, Mrs. Meyers replied:
"The door, this that and the other, I recognized this man the moment I saw him."

29/ Supra, note 1.

30/ Supra, note 2.

31/ Tr. 7/19/67, pp. 60-83.

32/ Government Exhibits Nos. 1 and 2 (Supra, note 14).

should have included the testimony of Meder and Young as well as the testimony of the remaining eye witnesses. Instead, the court made it quite clear that he was not going to have any further hearing out of the presence of the jury.[33] Also, appellant's counsel as well as counsel for the government were confused as to the effect of the Wade,[34] Gilbert[35] and Stovall[36] cases. All of the suggestive confrontations and showings of photographs were pre-Stovall confrontations and counsel for the government kept insisting that the Stovall case was not retroactive.[37] Further, the court denied appellants request that he be provided with a copy of the transcript of the first trial in this case so that the witnesses could be properly cross-examined.[38]

(8) The man with the gun (appellant was identified as this man) had at least the lower portion of his face covered with his hat most of the time during the robbery. On this factor, Mrs. Meyers stated at the first trial that the person with the gun "took his hat and placed it back andforth over his face".[39] At the second trial she denied saying this and instead said "everytime I looked straight at him he would bring his hat up in front of his face and bring it

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33/ Tr. 7/19/67, p. 74.
34/ United States v. Wade, 388 U.S. 218, 18 L. Ed. 2d 1149 (1967).
35/ California v. Gilbert, 388 U.S. 263, 18 L. Ed. 2d 1178 (1967).
36/ Supra, note 1.
37/ Tr. 7/18/67, pp. 10-12 and 7/19/67, pp. 58-59 & 64.
38/ See Infra, Argument III.
39/ Tr. 4/25/67, p. 4.

down".[40] On the other hand, Mrs. Storey testified at the second trial that she was unable to make a positive identification because the man with the gun "kept his hat moving in front of his face" and that therefore she only got a view of his eyes.[41]

The courtroom confrontation and the showing of the photographs were clearly suggestive. The facts of this case fail to show any necessity or justification for the suggestive confrontation and showing. Further, in this case, the "totality of the circumstances" was conducive to irreparable, mistaken identification because the pertinent facts actually are more probative of unreliability then they are of reliability.

Since the courtroom confrontation and the showing of the photographs were clearly violative of appellants Fifth Amendment Rights, testimony regarding the same should be excluded.

The burden is upon the Government to establish by clear and convincing evidence that in-court identifications are based upon observations other than occurrences which are violative of due process.[42] There was no attempt made by the government to

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40/ Tr. 7/19/67, pp. 110-116.

41/ Tr. 7/20/67, p. 158.

42/ This burden is set forth in United States v. Wade 388 U.S. 218, 240, 18 L. Ed. 2d 1149, 1164 (1967). Also see Gilbert v. California, 388 U.S. 263, 18 L. Ed. 2d 1178 (1967). Although the Stovall case expressly holds that it is not necessary to apply the constitutional aspects of Wade and Gilbert retroactively, this court has stated, in the Wright case (Supra, note 19), that the dispositional principles set forth in Wade and Gilbert apply anologously to Stovall issues.

fulfill this burden and in fact, the record taken as a whole, as discussed above, shows that the testimony of Mrs. Meyers and of Mrs. Storey is tainted beyond repair by the unnecessarily suggestive confrontations of this case. Accordingly, the case should be reversed and remanded and upon remand the identification testimony of Mrs. Meyers and Mrs. Storey should be suppressed.

ARGUMENT II*

THE ADMISSION OF TESTIMONY AS TO IDENTIFICATION AT THE TIME OF THE UNNECESSARILY SUGGESTIVE SHOWING OF PHOTOGRAPHS WAS IN VIOLATION OF APPELLANTS CONSTITUTIONAL RIGHTS

The hearsay testimony of the witnesses Meyers and Storey with regard to their own statements, given at the time of the unnecessarily suggestive showing of photographs, was clearly prejudicial and violative of due process.

As developed above, with regard to Argument I, the witnesses Meyers and Storey were shown photographs of appellant under unnecessarily suggestive circumstances which were violative of due process. At the time of this showing, each of these witnesses made only a tentative identification[43] and yet later, each was permitted to testify about this tentative pictorial identification and about their own statements made at that time.[44]

In the Wright case, which concerned a pre-Wade and Gilbert confrontation, this court held that if a pretrial confrontation constitutes a Stovall type due process violation, the dispositional principles set

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43/ Supra, note 12.

44/ Tr. 7/19/67, pp. 124-125 and 7/20/67, pp. 172-175. Also see the testimony of Fallin at 7/19/67, pp. 73-74.

* The court's attention is specifically directed to Transcript pages as follows: 7/19/67, pp. 73, 74 & 123-125; and 7/20/67, pp. 172-175.

forth in Wade and Gilbert should be applied anologously in spite of the fact that the holdings of these cases do not necessarily apply retroactively.[45/] Thus, this court held in Wright that unless the testimony regarding the unnecessarily suggestive confrontation "was harmless beyond a reasonable doubt" such testimony should have been excluded. Further, it is urged that in accordance with the principles, discussed in the Clemons[46/] case, which also concerned a pre-Stovall pretrial confrontation, the Government's direct case should not profit from testimony regarding the confrontation.

Thus, the prejudicial testimony of the witnesses Meyers and Storey concerning the unnecessarily suggestive showing of photographs and their statements made at the same time should not have been admitted over timely objection by counsel for appellant.

45/ Supra, note 42.

46/ Clemons v. United States, ___ U.S. App. D. C. ___, 408 F. 2d 1230, 1241 (1968).

ARGUMENT III*

THE DENIAL OF A TRANSCRIPT OF THE FIRST TRIAL WAS VIOLATIVE OF APPELLANT'S PROCEDURAL AND CONSTITUTIONAL RIGHTS

The court erred during the second trial in not providing appellant with a copy of the transcript from the first trial so that the defense during the second trial could be conducted "as required by a diligent United States Attorney", and so that cross-examination of witnesses could be effectively accomplished. This error not only violated the express language of 18 U.S.C. §3006A (e), but also constituted a denial of the right to confront witnesses as guaranteed by the Sixth Amendment.

Appellant himself asked the court on several occasions during the second trial to provide the transcript, stating that he didn't have any money.[47/] These requests were made after it had become apparent that the veracity of each witness was in question and that the transcript was necessary for proper cross-examination. Further, it was apparent from certain proceedings in the first trial, that in

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47/ Tr. 7/20/67, pp. 252-254 and 7/24/67, p. 52.

* The court's attention is specifically directed to Transcript pages as follows: 4/25/67, p. 4; 4/26/67, pp. 38 & 39; 7/19/67, pp. 110-116; 7/20/67, pp. 252-254; 7/24/67, pp. 52, 53 & 176-179; and 7/25/67, pp. 218 & 219.

spite of the fact that appellant's counsel was retained, appellant himself was without funds[48] and in that instance the court in the first trial granted appellant's request for a partial transcript of MacFarland's testimony up to that point. The court in the second trial denied appellant's requests.

Later, appellant's counsel asked merely that he be provided with the remainder of the transcript of MacFarland's testimony from the first trial so that MacFarland could be impeached on certain inconsistencies.[49] In response to this request the court stated that he could see no inconsistencies in MacFarland's testimony and the transcript was not provided.[50]

Still later appellant himself once again requested the transcript of the first trial for impeachment purposes so he could have "a fair trial" and be in a position to "impeach a witness".[51]

The purpose of 18 U.S.C. §3006A (e) is to provide "services necessary to an adequate defense" for indigent defendants. Although appellant had originally retained his trial counsel he had long since exhausted all of his funds. The court in the first trial recognized this and granted appellants request for a partial transcript of the testimony

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48/ Tr. 4/26/67, pp. 38-39.
49/ Tr. 4/24/67, pp. 176-179.
50/ Tr. 7/24/67, p. 178.
51/ Tr. 7/25/67, pp. 218-219.

of MacFarland.[52] The court in the second trial appeared to base his refusal to provide the transcript at least partially, on the fact that appellant had retained counsel.[53]

The request was timely because appellant did not know prior to the second trial that he would be faced with inconsistent testimony from witnesses. During the second trial appellant became aware of certain inconsistencies[54] and thereafter a copy of the transcript was requested so that the cross-examination would be meaningful. Thus, the denial of the transcript prevented proper cross-examination and therefore was a denial of the right to confront witnesses as guaranteed by the Sixth Amendment.[55]

In considering the applicability of 18 U.S.C. §3006A (e) to trial transcript the District Court in the case of United States v. Pope[56] stated:

> "Copies of transcripts and daily copy in the appropriate circumstances unquestionably are an essential tool in defense work. This view is supported by the commentary in the Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice which, in

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52/ Supra, note 48.

53/ For example, see the colloquy at Tr. 7/19/67, pp. 111-115 where appellant's trial counsel also erroneously apparently feels that appellant could not qualify as an indigent.

54/ Supra, note 39 and 40 for example.

55/ See Smith v. Illinois, 390 U.S. 129, 19 L. Ed. 2d 956 (1968) where the Supreme Court held that "the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." Note that this case also did not involve a complete denial, but rather a denial of effective cross-examination.

56/ 251 F. Supp. 234 (D. Nebr. 1966).

> describing the kinds of services contemplated by the provision under consideration, specified 'investigatory services the assistance of experts, transcripts of the proceedings, and the like.' (Italics added.) See, op. cit. 40 (1963). As a matter of further guidance in these proceedings, it is also appropriate to note that the plan adopted in this district implementing the Criminal Justice Act provides that 'the fact finding services contemplated by the plan are similar to, but are not necessarily the same as, the services utilized in careful police work or required by a diligent United States Attorney. In passing on an application for such fact finding services, the Judge need only be satisfied that they reasonably appear to be necessary to assist counsel in his preparation and trial of his case and that the defendant is unable to pay for them. (Italics added.) That Court finds these items as within the scope of services other than counsel provided for under subsection (e) of the Act." 251 F. Supp. at 240 (Emphasis supplied)

Thus, it is urged that the denial of the transcript was error and contrary to the express provisions of 18 U.S.C. §3006A (e).

ARGUMENT IV*

THE TESTIMONY OF SULLIVAN WAS IMMATERIAL AND PREJUDICIAL

The court erred in admitting, over timely objection, Harold Sullivan's testimony regarding other indictments which resulted from MacFarland's testimony before the grand jury. (Sullivan was a United States attorney and was Chief of the grand jury section during the entire MacFarland investigation.) This testimony of Sullivan was immaterial to the issues in the case and was particularly prejudicial in that if left an inference that appellant may have been implicated in the other robberies.

As was well stated in the case of Womack v. United States,[57/] "It is settled that to be admissible a bit of evidence must have some potential probative weight upon the issue of fact under trial." Sullivan's testimony with regard to other indictments[58/] was thus, not only irrelevant, but it was completely immaterial. It could be said, in some instances that immaterial evidence could not harm a defendant in a criminal case; however, in this case, since those implicated were not identified and since

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57/ 111 U.S. App. D.C. 8, 294 F. 2d 204 (1961), cert. denied, 365 U.S. 859, 5 L. Ed. 2d 822 (1961).

58/ Tr. 7/24/67, pp. 10-13.

* The court's attention is specifically directed to Transcript pages as follows: 7/24/67, pp. 9-135.

no statement was made that appellant was not involved in the other robberies, the jury was left in a position where they were forced to speculate as to whether or not appellant was involved in the other crimes. Such a speculative situation was clearly harmful to appellant and warrants reversal.

The only testimony of Sullivan that had any bearing at all on the issues of this trial was that no promises were made.[59] The remainder of Sullivan's testimony[60] was the grossest of hearsay and was totally irrelevant to the issues at trial. The only apparent effect of this testimony was to apply a "good guy" gloss to the government's case. Thus, it is submitted that it was reversible error for the court to admit Sullivan's testimony over timely objection by counsel.[61]

59/ Tr. 7/24/67, p. 14.
60/ Tr. 7/24/67, pp. 9-135.
61/ Tr. 7/24/67, pp. 11-15.

ARGUMENT V*

THE REFUSAL TO PROVIDE APPELLANT WITH GRAND JURY MINUTES CONSTITUTED REVERSIBLE ERROR

It is urged that against the particular factual background of this case, it was error for the court to refuse to provide appellant with all of the grand jury minutes concerning the testimony of MacFarland and comments made by the prosecutor to the grand jury concerning MacFarland. Moreover, it is believed that appellant was entitled to such testimony and comments even though they did not relate to the St. Elizabeth's Hospital robbery.

MacFarland was apparently not indicted for his participation in any of the crimes about which he testified and the issue of whether or not MacFarland was promised anything in consideration for his testimony was hotly contested during this case. The Government's witness, Sullivan, was permitted, over objection, to testify with regard to the entirety of the grand jury proceedings involving MacFarland's testimony including the fact that other indictments

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* The court's attention is specifically directed to Government Exhibit No. 3, Defendant Taylor's Exhibit No. 1 and to Transcript pages as follows: 4/26/67, pp. 35 & 36; 7/21/67, pp. 338 & 375-377; 7/24/67, pp. 9-135; 7/25/67, pp. 214-219, 232 & 233; and 7/27/67, pp. 220-225.

were obtained.[62]

Complete cross-examination of the witnesses MacFarland and Sullivan was not possible without the entirety of the grand jury minutes. Hence, this case falls well within the spirit of Dennis v. United States[63] and Allen v. United States[64] and the refusal by the trial court to provide appellant with a complete transcript of the grand jury proceedings involving MacFarland's various affairs was a violation of appellant's Sixth Amendment right to confront witnesses. Further, the totality of Sullivan's testimony[65] surely opened the door for discovery of the entirety of grand jury minutes which relate in any manner to MacFarland or to his testimony.

The government, through the testimony of its agents Sullivan and Meder, insists that no substantial promises were made to MacFarland to induce his testimony.[66] Further, it was testified that no persuasion was used to prevent indictment of MacFarland for any of the offenses about which he testified before the grand jury.[67] Yet, the fact remains that although MacFarland testified about a great number of different offenses and about his own active partic-

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62/ Supra, note 58.
63/ 384 U.S. 855, 16 L. Ed. 2d 973 (1966).
64/ 129 U.S. App. D.C. 61, 390 F. 2d 476 (1968).
65/ Supra, note 60.
66/ Tr. 7/24/67, pp. 14-15 & 136.
67/ Tr. 7/24/67, p. 27.

ipation in many of them, he was never indicted for any of the same.[68] As a matter of act, he even admitted lying before the grand jury and was not even indicted for that.[69]

It seems inconceivable that the grand jury, on its own volition, and without instructions from government's counsel, would choose not to indict MacFarland for a single one of the offenses simply because he had informed on others. Surely, counsel for the government guided the grand jury in some manner, and in a case such as this, where the issue of whether or not promises were made is important, appellant is entitled to know what was said. Whatever was said by government counsel to the grand jury regarding whether or not they should indict MacFarland, would not necessarily be connected timewise with his testimony regarding the St. Elizabeth's Robbery. Moreover, the instruction probably was directed to MacFarland personally rather than to any specific offense. In fact, Sullivan stated that when the grand jury concluded its investigation he directed their attention back to certain matters such as the fact that MacFarland had cooperated.[70] Thus, the transcript of the entirety of the MacFarland proceeding, including comments directed to the grand jury by government counsel, is necessary to properly cross-

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68/ Tr. 7/24/67, p. 13 and 7/21/67, p. 338.
69/ Tr. 7/24/67, pp. 111.
70/ Tr. 7/24/67, pp. 102-104.

examine the witness Sullivan.

There is yet another reason why the entirety of MacFarland's grand jury testimony should have been made available to appellant, this being that MacFarland has certainly exhibited an ability to lie under oath[71] as well as to alter his statements when it is necessary to counter unanticipated developments.[72] Further, during his study of the background of this case, appellant's present court appointed counsel uncovered certain testimony by MacFarland, in another case where he also was an unindicted accomplice, to the effect that he had never been to St. Elizabeth's Hospital before.[73] Interestingly, this testimony was given under

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71/ Supra, note 69.

72/ Tr. 7/21/67, pp. 375-377. In Government Exhibit No. 3, MacFarland said he was the first to leave appellants apartment. However, after it had become apparent that appellant had an alibi (See Tr. 7/27/67, pp. 220-225) MacFarland changed his testimony to say that he was the first to leave after appellant returned.

73/ The court is respectfully requested to take judicial notice of a portion of the transcript in the case of United States v. Turner et al, Criminal No. 356-66 in the United States District Court for the District of Columbia where the following colloquy took place at pages 25 and 26 of the transcript of August 22 and 23, 1966:

"Q Mr. McFarland, have you ever been in St. Elizabeths Hospital?

A I have not.

Q You have not?

A That is right.

Q Have you ever had a mental examination?

A I have not.

Q You never have? Are you the same Clarence Wilbur McFarland who on February the 3rd, 1964, was committed to St. Elizabeths Hospital for a mental examination?

A I have never been to St. Elizabeths Hospital.

Q So you are not the same Clarence Wilbur McFarland who on February 3rd, 1964, was committed to St. Elizabeths Hospital for a mental examination? (Cont'd)

oath subsequent to MacFarland's grand jury testimony where MacFarland implicated himself as well as appellant in the robbery of St. Elizabeth's. MacFarland's grand jury testimony was given under some sort of condition whereby he was given amnesty for any crime where he could implicate others. It is submitted that all of the crimes were interrelated, at least in that MacFarland somehow was involved. In fact, certain testimony in this case indicates that many of the robberies about which MacFarland testifed were committed by an organized ring.[74/] Thus, it is submitted that his grand jury testimony with respect to other robberies might well be related to his testimony in the instant case.[75/]

73/ (Cont'd)

A You have the wrong--
Q Just asking if you are.
A You want me to explain that to you?
A No sir. I am just asking you if you are or not.
A I have never been to St. Elizabeths Hospital."

(Emphasis supplied.)

74/ Tr. 7/24/67, p. 91.

75/ Note for example that during the 12/21/65 interview of MacFarland by Meder (Government Exhibit No. 3), MacFarland stated that Mel Gibbs and "Crystal Ball" Frazier pulled the Atlantic Apartments robbery. He further states that Gibbs told him this personally. On the other hand, in his January 4, 1966 testimony before the grand jury (Defendant Taylor's Exhibit No. 1), MacFarland stated that Alvin Green and appellant Taylor were involved in that job. This certainly opens up the possibility that MacFarland harbors some personal animosity toward Green and appellant and is looking for some way to get them involved.

Hence, it is submitted that the transcript of the entirety of the grand jury proceedings involving all of MacFarland's testimony, whether directed to St. Elizabeth's or to other robberies, as well as government's counsel's remarks to the grand jury which were directed to MacFarland's special status as an informer should have been made available to appellant's counsel during the trial.

ARGUMENT VI*

THE ADMISSION OF MAC FARLAND'S TESTIMONY CONSTITUTED PLAIN ERROR. FURTHER, MAC FARLAND'S TESTIMONY CONCERNING THE "STOLEN CAR" AND "DIFFERENT ROBBERIES" IS IRRELEVANT AND SHOULD BE PRESUMED PREJUDICIAL

The admission of the testimony of Clarence W. MacFarland was Plain Error,[76/] particularly in view of the fact that appellant was not afforded proper opportunity for cross-examination. Specifically, it was error for the court to permit MacFarland to testify with regard to the "stolen car" in view of the fact that appellant had been acquitted of this crime previously and such testimony was not probative of the crimes charged. Additionally, MacFarland's statement with regard to his involvement in "different robberies" with the appellant was clearly prejudicial and it was PLAIN ERROR for the court not to declare a mistrial at that time.

Clarence W. MacFarland admitted from the stand that he had committed perjury before the grand jury during the investigation of the Giant Food Store robbery.[77/] In addition, MacFarland exhibited his ability to "bend with the wind" by first stating that he was the first

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76/ Rule 52 (b), Federal Rules of Criminal Procedure, 18 U.S.C.

77/ Supra, note 69.

* The court's attention is specifically directed to Government Exhibit No. 3, Defendant Taylor's Exhibit No. 1 and Transcript pages as follows: 5/4/67, p. 1006; 7/18/67, pp. 3-17; 7/20/67, pp. 262-265, 277 & 376; 7/21/67, pp. 375-377; 7/24/67, p. 111; 7/27/67, pp. 220-225; and 8/2/67 pp. 3 & 4.

to leave appellants house and then, after it became apparent that appellant had an alibi whereby timing was important, changing his testimony and stating that appellant was really the first to leave.[78/]

While it is admitted that the fact that a witness has lied about collateral matters may not always be admissible even for impeachment purposes, it is urged that when an overwhelming ability to speak inconsistently is shown, the entirety of the witnesses testimony should be stricken. This particularly is true if, as in this case, a proper opportunity for cross-examination was not provided.[78a/] MacFarland appears not only to have a disposition to speak untruthfully, but a preconceived plan. This plan has been fostered by the government because the government has steadfastly refused to push for an indictment of MacFarland, even for admitted perjury. Obviously, by the time of the trial in this case, MacFarland would have run a substantial risk of indictment if he had rejected his previous statements and had stated that appellant didn't do it, even if it was true that appellant didn't.

It should be noted that MacFarland testified inconsistently

78/ Supra, note 72.

78a/ See Supra, Arguments III and V where the refusal to provide the transcript of the first trial and the grand jury minutes is discussed.

about a matter which was directly pertinent to this case and under circumstances whereby the government should have been aware of the inconsistency, and yet this fact was never disclosed by the government. Appellant's court appointed counsel discovered this inconsistency during his investigation in this case.[79/] As in the present case, MacFarland was the principal witness for the government in Criminal No. 356-66 which was originally tried in August 1966. Denial by MacFarland that he had ever been to St. Elizabeth's Hospital was made subsequent to his grand jury testimony (January 4, 1966) and his various statements incriminating himself and appellant in the St. Elizabeth's robbery with which this case is involved.

Mr. Sullivan, who testified at great length in the present trial as to all of MacFarland's testimony before the Grand Jury, was trial counsel for the government during the Turner et al trial and yet the discrepancy was apparently never corrected nor mentioned to appellant's trial counsel, not even during the Turner et al trial. Granted that appellant's trial counsel also tried the Turner et al case, he was not in a position to recognize this inconsistency because he had been retained by appellant only shortly prior to the Turner et al trial and was not in a position at that time to recognize the significance of MacFarland's incorrect statement. This is not true of Sullivan,

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79/ Supra, note 73.

because, as Chief of the grand jury section of the U.S. attorney's office he was absolutely aware of all of MacFarland's previous statements and grand jury testimony and therefore Sullivan should certainly be charged with knowledge that MacFarland was testifying incorrectly when he stated during the Turner et al trial that he had never been to St. Elizabeth's Hospital.

Another instance where MacFarland was inconsistent appears in the transcript of the January 4, 1966 grand jury testimony where he stated that Alvin Green, James Taylor (the present appellant) and Mel Gibbs were involved in the robbery of the Atlantic Apartments. However, in the interview of December 21, 1965, MacFarland stated that Mel Gibbs and "Crystal Ball" Frazier committed this robbery.[80] This factor certainly indicates that MacFarland is biased against appellant in some manner, since he is so ready to positively implicate appellant even when he is not really that positive.

With respect to MacFarland's "stolen automobile"[81] and "different robberies"[82] testimony, such testimony was inadmissible and the court erred in not declaring a mistrial at the time such testimony was given. Evidence of crimes other than the one for which a defendant is on trial, is inadmissible and its admission constitutes reversible

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80/ Supra, note 75.
81/ Tr. 7/20/67, pp. 262, 264 & 265.
82/ Tr. 7/20/67, p. 277.

error unless it involves "no serious danger of undue prejudice."[83] While there are certain exceptions of this rule,[84] all of these exceptions deal with the relevance of the evidence to some issue other than a general propensity to commit crimes. Thus, the introduction of evidence of another crime, which is not relevant to some proper issue at the trial constitutes reversible error.

According to the testimony of MacFarland, he and the others, including appellant, stole an automobile which was used during the robbery. However, the court directed an acquittal as to this crime during the first trial which ended with a hung jury as to the remaining charges.[85] In spite of this acquittal, MacFarland was permitted, over strenuous objection by counsel for appellant,[86] to testify regarding the theft itself and to continuously identify the car as being a "stolen car". It is not seen how this testimony is relevant in any manner to any issue involved in this trial or to the crimes charged, to wit armed robbery, assault with a deadly weapon and carrying a deadly weapon. This court set forth, in the case of Drew v. United States,[87] certain exceptions to the general rule of inadmissibility to such evidence. However, the

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83/ Martin v. United States, 75 U.S. App. D.C. 399, 127 F. 2d 865 (1942).

84/ Drew v. United States, 118 U.S. App. D.C. 11 , 331 F. 2d 85 (1964).

85/ Tr. 5/4/67, p. 1006.

86/ Tr. 7/20/67, pp. 262 & 265.

87/ Supra, note 84.

"stolen car" testimony does not fall within any of the exceptions enumerated. Specifically the court stated:

> "Evidence of other crimes is admissible, when relevant to (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other, and (5) the identity of the person charged with the commission of the crime on trial. When the evidence is relevant and important to one of these five issues, it is generally conceded that the prejudicial effect may be outweighed by the probative value." 331 F. 2d at 90.

In addition to the foregoing, the court in the Drew case also recognized that in certain situations, evidence of other crimes may be utilized for impeachment purposes.

With regard to the present case, it can readily be seen that the "stolen car" testimony does not fall within any of the exceptions listed. Clearly, motive, intent and the absence of mistake or accident are not even issues in this trial. Further, the crimes of auto theft and armed robbery are not, in this instance, so interrelated that proof of the auto theft was probative of armed robbery. Additionally, the auto theft testimony was not necessary to establish identity or to impeach testimony of the appellant. In fact, it can not be fairly said that testimony regarding the auto theft and the stolen car was relevant for any

purpose whatsoever other than to show "criminal propensity" and this makes it prejudicial per se.

The fact that appellant had been acquitted of the crime of auto theft made introduction of the "stolen car" testimony even more repugnant. Thus, in the case of Lee v. United States,[88] this court stated:

> "... there is something inherently repugnant about adducing evidence of alleged crimes from which appellant has already been given judicial deliverance..." 368 F. 2d at 837.

Then, to add "fuel to the fire", counsel for the government stressed the stolen automobile testimony during closing argument.[89]

The statement by MacFarland regarding "other robberies" was elicited by a question from the court.[90] Accordingly, it is fair to assume that the answer was given undue weight by the jury. Further, counsel was in no position to object gracefully. The court recognized the fact that the answer was irrelevant and at least he should have admonished the jury to disregard the statement; however, in this instance the prejudicial effect of the error would not have been corrected even by proper instruction.

88/ 125 U.S. App. D.C. 126, 368 F. 2d 834 (D. C. Cir. 1966).

89/ Tr. 8/2/67, Vol. II, pp. 3-4. There are three separate volumes of transcript with this date, the first includes testimony of witnesses at the end of the trial (hereinafter designated Vol. I), the second includes closing arguments of counsel (Vol. II), and the third includes the charge and the verdict (Vol. III).

90/ Supra, note 82.

As discussed above in relationship to the stolen car testimony, MacFarland's statement concerning other robberies he was involved in with the appellant was not relevant for any purposes of the present trial and should therefore be presumed to be prejudicial because it is probative only of "criminal propensity".

Even if we were to assume arguendo that neither the "stolen car" nor the "other robberies" testimony is alone sufficiently prejudicial to warrant a new trial, surely the cumulative prejudicial effect constitutes reversible error.

ARGUMENT VII*

THE ENTIRE TESTIMONY OF MAVRITTE WAS IMMATERIAL AND SHOULD NOT HAVE BEEN ADMITTED OVER TIMELY OBJECTION BY APPELLANT'S COUNSEL

The court erred in admitting the testimony of Lafayette Mavritte, Jr. over timely objection by counsel for appellant. The testimony of Mavritte was completely immaterial to any issue in the case and was prejudicial in that it erroneously appeared to corroborate MacFarland's testimony.

MacFarland testified that on November 1, 1965, he, Alvin Green, James Taylor and Joseph Newman went to St. Elizabeth's Hospital for the purpose of robbing the same.[91] However, he went on to state, that Newman was recognized by someone so they all left without committing the robbery.[92] The robbery took place on the following day without Newman.[93] Newman denied going to the St. Elizabeth's Hospital on November 1, 1965 for the purpose of committing a robbery;[94] however, he did

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91/ Tr. 7/20/67, pp. 261-267.
92/ Tr. 7/20/67, p. 267.
93/ Tr. 7/20/67, pp. 267-272.
94/ Tr. 7/26/67, pp. 197, 204 & 205.

* The court's attention is specifically directed to Transcript pages as follows: 4/26/67, pp. 2(a)-2(f); 7/20/67, pp. 261-272; 7/26/67, pp. 197, 204 & 205; and 8/2/67, pp. 5-7, 30 & 31.

not deny that he was there on November 1, 1965. Instead, while he stated that he did not remember what he did on November 1, 1965, he also stated that he had been to St. Elizabeth's on several occasions and that he knew a lot of patients there.[95]

Mavritte was permitted to testify, over objection by appellant's counsel, that he saw Newman in the lobby of St. Elizabeth's Hospital on November 1, 1965.[96] This testimony, while it tends to be corroborative of MacFarland's statement to the effect that Newman went to St. Elizabeth's on November 1, 1965, is completely immaterial with regard to whether or not appellant robbed St. Elizabeth's on November 2, 1965. Further, this testimony does not impeach Newman because Newman never denied that he was at St. Elizabeth's on November 1, 1965. In this regard it should be noted that Mavritte's testimony to the same effect in the first trial was stricken.[97]

The Womack case[98] discussed above, set forth that "a bit of evidence must have some potential probative weight upon the issue of fact under trial" in order for it to be admissible. Mavritte's testimony has no relationship to the issue of whether or not appellant robbed St. Elizabeth's Hospital on November 2, 1965. It does not

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95/ Tr. 7/26/67, p. 204
96/ Tr. 8/2/67, Vol. I, pp. 5-7.
97/ Tr. 4/26/67, pp. 2(a)-2(f).
98/ Supra, note 57.

impeach Newman's testimony since it is entirely consistent therewith. It merely appears to corroborate the testimony of MacFarland which incidentally needs all the help it can get. However, as was well stated in the case of Ing v. United States: 99/

> "...corroborative evidence must be considered without the aid of the testimony to be corroborated, and ... must connect or tend to connect the accused with the commission of the crime with which he is charged." 278 F. 2d at 367. (Emphasis Supplied.)

Note, that while the court instructed the jury that non-corroborated testimony was weaker than corroborated testimony, 100/ he did not instruct them that testimony such as Mavritte's did not corroborate MacFarland's incriminating testimony. This compounded the prejudice which stemmed from introduction of this immaterial evidence.

The testimony of Mavritte was inadmissible. Further, it was prejudicial because it appeared to corroborate MacFarland's accusation of appellant without actually doing so. Accordingly the admission of this testimony constituted reversible error.

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99 / 278 F. 2d 362 (9th Cir. 1960).
100 / Tr. 8/2/67, Vol. III, pp. 30-31.

ARGUMENT VIII*

IN CLOSING ARGUMENT, THE PROSECUTOR INCLUDED STATEMENTS WHICH WERE ERRONEOUS AND IMPROPER

The court erred in permitting the prosecutor to include improper and erroneous statements in his closing argument. In this Circuit it has long been held "elementary that a prosecutor may not import his own testimony into a criminal trial".[101] Manifestly, this should particularly be true, where, as in this case, the prosecutor's closing argument included statements which were contrary to the actual testimony. Further, it is improper for a prosecutor to refer, in his closing arguments, to evidence which should not have been admitted.[102]

On three different occasions during his closing argument, the prosecutor made erroneous statements. Firstly, the prosecutor stated that Newman had denied being at St. Elizabeth's Hospital on November 1, 1965.[103] Secondly, the prosecutor stated on two different occasions that Shorter had denied making a certain statement to MacFarland regarding the fact that appellant could not have

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101/ King v. United States, 125 U.S. App. D.C. 318, 372 F. 2d 383, 394 (1967).

102/ United States v. Guglielmini, 384 F. 2d 602, 606 (2d Cir. 1967).

103/ Tr. 8/2/67, p. 23.

* The court's attention is specifically directed to Transcript pages as follows: 7/26/67, pp. 114-127, 204 & 205; 7/27/67, pp. 296-301; and 8/2/67, Vol. II, pp. 3, 4, 19, 23 & 60-76.

participated in the robbery because he was in court at the time.[104] Neither of these statements were correct.

With regard to the first erroneous statement. Newman did not deny that he was at St. Elizabeth's Hospital on November 1, 1965, but rather he agreed that he very possibly could have been.[105] In this regard, the colloquy proceeded as follows:

> "Q Did you go to St. Elizabeth's Hospital on November 1, 1965, and were you recognized there by anyone?
> A I told you I have been to St. Elizabeth's Hospital several times and I recognize a lot of people and I know a lot of patients over there.
> Q Did you go in that hospital on the 1st of November, 1965?
> A I told you I don't remember what I did on November 1st, 1965."

The only thing that Newman denied was going to the hospital with appellant for the purpose of committing a robbery,[106] and it was not fair for the prosecutor to characterize Newman's testimony as follows:

> "He doesn't know where he was but he was not at St. Elizabeth's that day."[107]

This error was compounded in view of the fact that the prosecutor then went on to discuss the inadmissible testimony of

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104/ Tr. 8/2/67, pp. 19 & 64.
105/ Tr. 7/26/67, p. 204.
106/ Tr. 7/26/67, pp. 204-205.
107/ Supra, note 103.

Mavritte[108] to the effect that Mavritte saw Newman at St. Elizabeth's on November 1, 1965.[109] The only justification for the introduction of Mavritte's testimony would be to impeach Newman. It did not do this because it was consistent therewith. However, the prosecutor, by erroneously characterizing Newman's testimony, provided apparent justification for introducing and discussing Mavritte's testimony. The erroneous characterizations of Newman's testimony by the prosecutor during final argument is reversible error in accordance with the King case[110] while the use of Mavritte's inadmissible testimony during final argument constitutes error in accordance with the Guglielmini case.[111]

With respect to the second erroneous statement mentioned above, Shorter's actual testimony indicated either that Shorter didn't remember[112] or that an attorney-client privilege was involved.[113] However, nowhere in Shorter's testimony[114] can a denial that such a conversation took place be found. In spite of this, the prosecutor characterized Shorter's testimony as follows:

108/ As discussed in Argument VII, supra, Mavritte's testimony was immaterial and should not have been admitted over objection of counsel on the basis that it neither impeached Newman's testimony nor properly corroborated MacFarland's testimony.

109/ Tr. 8/2/67, p. 23.

110/ Supra, note 101.

111/ Supra, note 102.

112/ Tr. 7/26/67, pp. 122 & 124.

113/ Tr. 7/26/67, p. 125.

114/ Tr. 7/26/67, pp. 114-127.

"He answered and said he did not tell MacFarland that."[115]

"Mr. Shorter, in answer to my question, said that he never made that statement."[116]

Thus, once again the prosecutor has inserted facts which are not supported by the record and which in fact are contrary to the record.

In addition to the foregoing, the prosecutor stressed the stolen automobile in his closing argument.[117] As discussed above in Argument VI, the introduction of this evidence was reversible error. Here, the prosecutor compounds this error by discussing the inadmissible evidence in final argument. This is directly contrary to the law as expressed in the Guglielmini case.[118]

In the same manner, the prosecutor discussed the fact that the witness Hood had been indicted for something and then later plead guilty to a lesser offense.[119] Evidence concerning the indictment was inadmissible in the first instance because this was an attempt "to discredit by means of purported misconduct short of conviction."[120] Thus, again the prosecutor discussed inadmissible evidence in his final argument.

115/ Tr. 8/2/67, p. 19.
116/ Tr. 8/2/67, p. 64.
117/ Tr. 8/2/67, p. 3 & 4.
118/ Supra, note 102.
119/ Tr. 8/2/67, p. 62. Also see the improper mode of questioning used by the prosecutor at Tr. 7/27/67, pp. 296-301.
120/ See Lee v. United States, 125 U.S. App. D.C. 126, 368 F. 2d 834, 837 (1966).

The closing argument of the prosecutor was improper for still another reason. The prosecutor "testified" concerning whether or not he turned Hood in to Captain Layton. Then, after the court sustained timely objection, the prosecutor added one more parting shot inferring that a check of the personnel file would not provide justification for Hood's testimony. This type conduct by a prosecutor is expressly held to be improper in the King case.[121]

In addition, it was just plain unfair and improper for the prosecutor, in his rebuttal argument,[122] to launch a personal attack on appellant's trial counsel. He stated that counsel's questions were improper and generally downgraded counsel's search for truth as a mere fishing expedition.[123] This, it is urged, is improper in closing argument, or for that matter, at any other time during a jury trial.

Accordingly, it was reversible error for the court to permit the prosecutor to give a closing argument which: (1) included erroneous statements; (2) included a discussion of evidence which was inadmissible; (3) included "testimony" of the prosecutor; and (4) was just plain unfair and improper.

121/ Supra, note 101.
122/ Tr. 8/2/67, pp. 60-76.
123/ Tr. 8/2/67, p. 63.

ARGUMENT IX

REVERSIBLE ERROR AS TO GREEN WOULD CONSTITUTE REVERSIBLE ERROR AS TO APPELLANT

Appellant herein and his co-appellant Alvin Green (No. 21,460) are so connected together by the testimony of the accomplice MacFarland,[124/] that any error as to one would constitute error as to the other. Thus, it is urged that all of the arguments presented by co-appellant Green in his brief in Appeal No. 21,460 should apply equally to appellant. Accordingly, these arguments are specifically adopted by appellant.

124/ Tr. 7/20/67, pp. 269-272.

CONCLUSION

Appellant prays that this Court reverse his conviction and remand with instructions to dismiss the indictment, or, in the alternative, to reverse and remand for a new trial and appropriate hearings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief has been personally served at the office of the United States Attorney, United States Courthouse, Washington, D.C., this 14 th day of July, 1969.

James H. Marsh, Jr.

James H. Marsh, Jr.

"APPENDIX"

1. The following Transcript pages were specifically referred to in the Brief:

Date	Pages
4/25/67	4
4/26/67	2(a)-2(f), 35, 36, 38 & 39
5/4/67	1006
5/5/67	3-6
7/18/67	3-17
7/19/67	58-125
7/20/67	143, 144, 158, 166-168, 172-175, 180, 252-254, 261-273 & 277
7/21/67	338 & 375-377
7/24/67	9-135, 162 & 176-179
7/25/67 A.M.	194, 195, 214-219, 232 & 233
7/26/67	114-127, 183-190, 197, 204 & 205
7/27/67	220-225 & 296-301
8/2/67, Vol. I	5-7
8/2/67, Vol. II	3, 4, 19, 23 & 60-76
8/2/67, Vol. III	30 & 31

2. The following Exhibits were specifically referred to in the Brief:

Government Exhibits Nos. 1, 2, 3, 3(a), 3(b) & 3(c)
Defendant Taylor's Exhibit No. 1

30-1

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21,532

JAMES R. TAYLOR, Appellant

v.

THE UNITED STATES OF AMERICA, Appellee

Appeal from Judgment of the
United States District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 26 1969

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September 26, 1969

I N D E X

AUTHORITIES

* Cases chiefly relied upon are marked by an asterisk.

ARGUMENT.

I. APPELLANTS WERE NOT FULLY AND FAIRLY IDENTIFIED AS THE ROBBERS OF ST. ELIZABETHS HOSPITAL

A. The Pre-Trial Confrontations In This Case Were Suggestive, Unnecessary And Conducive To Irreparable Mistaken Identification

1. The photographs. Contrary to the government's argument,[1] when cashier-witness Mary Meyers picked out appellant Taylor's photograph as the possible gunman at St. Elizabeths, she picked it from four photographs, the other three of which pictured the other three suspects in this case.[2] Also, at the time of this photographic identification, the informer, McFarland, whose picture was included, had already been picked out of a line-up viewed by both Mrs. Meyers and Mrs. Storey.[3]

In Simmons v. United States,[4] the Supreme Court found that "the identification procedure employed may have in some respects fallen

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1 / Brief for Appellee, p. 7.

2 / Government Exhibits Nos. 1 and 2. It is true that Detective Sergeant Fallin testified that "maybe six" photographs were shown, however, this testimony is not positive. On the other hand, F.B.I. Agent Meder's statements concerning the December 22, 1965 interview with Mrs. Meyers and Mrs. Storey stated positively that only photographs of the four suspects were shown.

3 / It should be noted that before McFarland was identified both of these witnesses selected a photograph of James Stanley Brown as resembling the gunman. See Tr. 7/26/67, pp. 184 & 187.

4 / 390 U.S. 377, 385, 19 L Ed 2d 1247, 1254 (1968).

short of the ideal."[5] However, the court found that the shortcomings in Simmons were counter-balanced by the fact that (1) the photographs were shown to five witnesses on the day after the crime while the memories of the witnesses were still fresh; (2) the photographs were shown at a time when none of the witnesses were aware of the progress of the investigation; (3) not all of the photographs shown were of suspects in the case; (4) all five of the eye witnesses positively identified Simmons' photograph; (5) the witnesses were alone at the time that they were shown the photographs; and (6) all five of the positive identifications were subsequently confirmed. Thus, in Simmons, THE TOTALITY OF THE CIRCUMSTANCES compelled the court to find that in spite of the fact that the showing of the photographs fell short of the ideal, the strength of the other factors in the case indicated that mistaken identification was unlikely.

On the other hand, in the instant case, the photographs were shown to the witnesses a month and a half after the robbery and at a time when their memories surely had dimmed.[6] Further, at the time the photographs were shown, the witnesses were aware of the progress of the investigation

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5 / This is contrary to the Government's argument where it was urged that the court found that the procedure utilized was not unfair. See Brief for Appellee, p. 7.

6 / Government Exhibits Nos. 1 and 2. Also see the Brief for Appellee, p. 9, footnote 7.

since they had each previously selected McFarland from a line-up [7] (one of the photographs shown was, of course, of McFarland). Additionally, all of the photographs were of suspects in the case. Only Mrs. Meyers was able to tentatively identify Taylor [8] and she had previously tentatively identified James Stanley Brown as the gunman. [9]

While the government insists that there is nothing in the record to support the fact that the witnesses were together at the time of the photographic showing, [10] the similarity of the reports of the interview of December 22, 1965 indicates that it is likely that Mrs. Meyers and Mrs. Storey were together at the time. [11] Additionally, it should be recognized that there is even less support in the record for the fact that the investigative practice of the F.B.I. is to interview witnesses singly. It must be kept in mind that not only were all of the photographs of suspects (including McFarland who had been identified previously), but also the gun used in the robbery was exhibited at the same time. [12]

It does not follow that a suggestive showing would cause every witness to be misled. Thus, it cannot fairly be said that just because

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7/ Tr. 7/26/67, pp. 184 & 187.
8/ Government Exhibit No. 1.
9/ Ibid.
10/ Brief for Appellee, p. 7.
11/ Government Exhibits Nos. 1 and 2.
12/ Ibid.

Mrs. Storey was unable to make an identification, the showing of the photographs was not suggestive. Mrs. Meyers, on the other hand, certainly must have been influenced by the fact that Mrs. Storey stated, during the interview, that she recognized both McFarland and the revolver.[13]

While the government argues that Mrs. Meyers' testimony was consistent,[14] this is not supported by the facts.[15] How can one be deemed consistent when they deny saying something they actually said. If in fact Mrs. Meyers' testimony in the second trial was consistent with her testimony in the first trial then why did she deny using her actual language. The only answer is that she knew she was testifying differently and knew it was important.

In conclusion, the record does not support the fact that "the witnesses had strong images of the robbers from the crime itself". In fact, the record taken as a whole indicates that the very probable source of the witnesses' identification testimony was the tentative identification made of the photographs coupled with Taylor's appearance in court without benefit of a fairly conducted line-up.

13/ Government Exhibit No. 2.
14/ Brief for Appellee, p. 8, footnote 6.
15/ Compare Tr. 7/19/67, pp. 110-116 with Tr. 4/25/67, p. 4. Also compare Tr. 7/19/67, pp. 116-118 with Tr. 7/26/67, pp. 183-184.

2. Appellant Taylor's courtroom confrontation with the eye witnesses at his first trial. When Taylor entered the courtroom at the start of his first trial he most certainly was being presented to the witnesses as the one implicated in the crime. 16/ The witnesses could have had no doubt but that the government certainly believed appellant Taylor was the guilty party. The government just wouldn't go to the trouble of trying someone unless they believed that he had committed the crime with which he was charged. Thus, in effect, when Mrs. Meyers and Mrs. Storey were asked to identify defendant, they were in essence being asked, this is the guy, isn't it. The courtroom confrontation could have had no other effect and therefore it was extremely suggestive.

In spite of the fact that the government should have anticipated such a suggestive confrontation, they still did not afford appellant Taylor with the safeguard of a properly conducted line-up. Further the government has not been able to come up with an excuse for not having a line-

16/ See Tr. 7/19/67, pp. 61-67 and 7/20/67, pp. 166-168.

up but merely argues that the seventeen month delay was not unnecessary.[17] Appellant has not argued, in this respect, that his rights were violated by virtue of the long delay. Rather, his argument is that in view of the long delay, there was no justification for not having a line-up. It is because of this that appellant argues that the suggestive courtroom confrontation was UNNECESSARY since the government could have avoided the confrontation merely by conducting a line-up properly designed to fairly test the memory of the eye witnesses.[18]

B. The Challenged Identification Testimony Had Substantial Impact On The Jury

Appellant agrees that the correct way to test whether error is harmless beyond a reasonable doubt is to assess the "probable impact. . .

17/ The government argues (Brief for appellee, p. 19, footnote 8) that a line-up is unnecessary where police have conducted fair photographic identifications. In support of this contention they cite United States v. Hamilton, ____ U.S. App. D.C. ____, ____ F. 2d ____, No. 22,361, Slip Op. (July 24, 1969). In Hamilton, however, the photographs were shown the next morning, the witnesses made a positive identification based on the photograph, the photograph showing was fairly conducted (15 photographs in all), and there was strong extrinsic evidence pointing to guilt. None of these factors was present in the present case where the witnesses had previously identified another person (Brown), the showing was 50 days after the robbery, no positive identification of the photographs was made, and there was no strong extrinsic evidence which pointed to guilt.

18/ Brief for Appellee, p. 9, footnote 7.

on an average jury".[19] Proper application of this test, however, leads inescapably to the conclusion that the jury was very much influenced by the challenged identification testimony in this case. In fact, it must be remembered that in the first trial in this case, in spite of the presence of the challenged identification testimony, the jury was unable to arrive at a decision of guilty. In fact, appellant urges that without the challenged identification testimony the jury just would not have believed the INCREDIBLE testimony of the informer McFarland.

In arguing that the challenged identification testimony had little impact on the jury, the government has argued that "if the jury believed McFarland, the witnesses identification testimony was superfluous".[20] However, in continuing their argument, the government's reasoning becomes circuitous since they argue that the challenged identification testimony is unnecessary if the jury believed McFarland and then they argue that the jury must have believed McFarland because his testimony was corroborated by this same unnecessary testimony.[21]

19/ See Brief for Appellee, p. 10.
20/ Brief for Appellee, p. 10.
21/ Ibid.

Further, the government argues that the jury must have believed McFarland because he was corroborated on certain minor details in the crime.[22/] Appellant has nowhere claimed that McFarland was not involved in the crime. He most certainly was. Appellant's argument is rather directed only to the fact that McFarland lied when he said appellant Taylor was involved.

Accordingly, the challenged identification testimony which corroborated McFarland concerning appellant Taylor's involvement in the crime surely had substantial impact on the jury and it is doubtful that the jury would have convicted Taylor without such testimony. Manifestly, if Taylor had been provided with the safeguard of a properly conducted line-up in this case, the prejudice which resulted from the suggestive and unnecessary photographic display and courtroom confrontation would have been cured.

II. THE TESTIMONY OF THE GOVERNMENT'S WITNESSES WAS NOT PROPERLY ADMITTED

A. The Credibility Of McFarland's Testimony Should Not Have Been Left To The Jury

This argument was fully developed in appellant's original brief in

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22/ Ibid.

this case.[23] However, the government has made one point which properly needs rebutting. The government urges that appellant Taylor should be deemed to have waived any objections regarding the fact that in his testimony in United States v. Turner,[24] McFarland denied that he had ever been to St. Elizabeths.[25]

It is true that appellant's trial counsel (Mr. Koonin) had a copy of the transcript of United States v. Turner at the time of the trial below. However, the significance of McFarland's testimony escaped the attention of Mr. Koonin. It must be noted that at the time of McFarland's testimony in the Turner case, Mr. Koonin had been retained by Taylor for a period of only a week or so. Therefore, Mr. Koonin was in no position to attach any significance to McFarland's testimony in this regard. Moreover, in the interest of PLAIN JUSTICE, such a denial by McFarland should have the effect of totally incapacitating him with respect to testifying against appellant in this case. McFarland's inability to tell the truth coupled with actual knowledge that the government would not prosecute him even for perjury,[26] made it quite clear to McFarland that his oath at the beginning of his testimony was virtually meaningless.

23/ Brief for Appellant Taylor, pp. 48-55.
24/ Cr. No. 356-66(D. D. C. 1966).
25/ Brief for Appellee, p. 12, footnote 10.
26/ Tr. 7/24/67, p. 111.

B. Assistant U.S. Attorney Sullivan's Testimony Tended To Unfairly Corroborate McFarland's Testimony With The Resultant Prejudice To Appellant

The government argues that Sullivan's testimony was not entered to bolster the government's case-in-chief.[27] Why then do they urge continuously that McFarland's testimony was corroborated by Sullivan.[28] This seems highly inconsistant.

The fact that Sullivan's testimony does tend to corroborate McFarland's testimony is what makes it extremely prejudicial to appellant since it consists entirely of hearsay. Contrary to the government's argument, appellant does not attack Sullivan's testimony on the basis that Sullivan was not present at the time McFarland testified before the Grand Jury.[29] Rather the gravamen of the argument is that Sullivan was not present during the robbery. In spite of this, Sullivan was permitted to testify concerning events which occurred at St. Elizabeths and about other events which he learned of from McFarland or McTague. That is to say, even if Sullivan had been present during McFarland's Grand Jury testimony all of Sullivan's testimony would still be nothing more than hearsay. The

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27/ Brief for Appellee, p. 14.
28/ Brief for Appellee, pp. 11, 12, 13 and 14.
29/ Brief for Appellee, p. 14.

fact that he was not present makes his testimony double hearsay, which is even worse.

It is not seen how the government can characterize Sullivan's testimony concerning other crimes as rebuttal.[30] What is it that this testimony rebuts? In any event, it is believed that the same rules of evidence which apply to testimony-in-chief should also apply to so-called rebuttal testimony. The government has cited no case which would indicate that hearsay testimony is proper during rebuttal.

III. THE TESTIMONY OF OTHER CRIMES HAD NO RELEVANCE WHATSOEVER TO THE CRIME CHARGED AND THEREFORE IT TENDED SOLELY TO DISCREDIT APPELLANT'S CHARACTER

The government argues that the testimony regarding the other robberies was admissible because it tended to show a common plan or scheme.[31] However, to be admissible in this regard, testimony must not only show a common scheme or plan but in addition must show that the common scheme or plan embraces "the commission of two or more crimes so related to each other that proof of the one tends to establish the other".[32]

30/ Brief for Appellee, p. 13.
31/ Brief for Appellee, pp. 15 and 16.
32/ Drew v. United States, 118 U.S. App. D.C. 11, 331 F. 2d 85, 90 (1964).

There is nothing in the record which indicates any relationship whatsoever between the other crimes mentioned by McFarland and the robbery of St. Elizabeths Hospital.

The government has tried to infer from the record that had McFarland been permitted to continue testifying about the other robberies, he would have shown a common scheme or plan in their perpetration.[33] This is a pure speculation on the government's part and such inference finds no support in the record. Thus, the testimony regarding other crimes was extremely prejudicial to appellant Taylor since its only relevance was that it tended to show a general propensity to commit robbery.[34]

The government urged that the stolen car testimony formed a link in the chain of circumstances culminating in the offense charged.[35] They cited Borum v. United States[36] and Tomlinson v. United States[37] in support of this argument.[38] In Borum the other crime tended to prove

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33/ Brief for Appellee, p. 16.

34/ The case of Brehm v. United States, 90 U.S. App. D.C. 370, 196 F. 2d 769 (1952) is inapposite since in that case the scheme itself and the mode for carrying out the graft was identical in each case. The only thing different was that a different victim was involved in each case. The modus operandi was the same.

35/ Brief for Appellee, p. 16.

36/ 61 U.S. App. D.C. 4, 56 F. 2d 301, cert. denied sub nom. Logan v. United States, 285 U.S. 555 (1932).

37/ 68 U.S. App. D.C. 106, 93 F. 2d 652 (1937)

38/ Brief for Appellee, p. 16.

a motive for murder. The conspiracy in Tomlinson was certainly relevant to the substantive crime and in reality it is not logically a separate offense. Thus, in both of the cases cited by the government proof of the other crime was logically relevant to the crime for which the defendants were being tried. In the present case, it cannot be seen, and the government fails to argue, the manner in which the stolen car testimony tends to prove the robbery of St. Elizabeths.

While the government insists that appellants reliance on Lee v. United States [39] is misplaced, [40] it is appellant's position that the Lee case very strongly points out that proof of crimes for which defendant has been acquitted is inadmissible even for impeachment purposes. Even more so such proof would be inadmissible for purposes of proving a separate crime.

The government urges that in both instances of improper testimony the trial court immediately gave a curative instruction. [41] A reading of the record in this regard, however, does not compel the conclusion that the instructions were in fact curative. [42] In the first place, the court did not instruct the jury that proof of the other crimes and of the stolen car did

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39/ 125 U.S. App. D.C. 126, 368 F. 2d 834 (1966).
40/ Brief for Appellee, p. 16, footnote 14.
41/ Brief for Appellee, p. 16.
42/ Tr. 7/20/67, pp. 263 & 277.

not prove the robbery of St. Elizabeths. Even more importantly, the court's instruction regarding the other robberies was directed to the witness rather than the jury. Additionally, the court's statement fails on its face as a curative instruction since it just does not instruct the jury how they should handle the testimony regarding the other robberies. In any event, the testimony of the stolen car and the testimony of the other robberies was so prejudicial that no instruction could have completely erased the effect thereof on the minds of the jury.

IV. APPELLANT TAYLOR HAD A TRANSCRIPT OF ONLY A MINOR PORTION OF THE PREVIOUS TESTIMONY AGAINST HIM

Appellant Taylor was unable to obtain relevant and necessary portions of the transcript of the first trial. Contrary to the government's arguments,[43/] appellant Taylor had only a partial transcript of McFarland's testimony. The record just does not support the conclusion that appellant Taylor was provided with a transcript of anything other than the April 26, 1967 testimony of McFarland, in spite of Mr. Koonin's statement which was not testimony. The statement was made in the heat of the trial and cannot be relied upon to provide support for the fact that appellant Taylor had been provided with a transcript of everything important.

43/ Brief for Appellee, pp. 16 & 17.

In fact, a reading of the transcript of Mrs. Meyer's testimony[44] indicates that Mr. Koonin was severely handicapped by not having her prior testimony. It is granted that Mr. Koonin kept excellent notes of the first trial however, the judge made the jury quite aware that these were only notes and not a transcript.[45] If Mr. Koonin had had a transcript of Mrs. Meyers' previous testimony, she would have been completely impeached on the issue of the waving hat. As it turned out, she denied having made certain statements which she had in fact made, and Mr. Koonin was unable to properly present this fact to the jury because of his lack of a transcript of her first trial testimony. Thus, appellant Taylor's defense was severely prejudiced in this and many other regards.

With respect to the Grand Jury minutes, these are extremely relevant to appellant Taylor's theory of defense. It seems inconceivable that the Grand Jury would have refused to indict McFarland unless they had been carefully instructed that they should not. Further, the Grand Jury would have been unable to evaluate McFarland's testimony from the standpoint of good of the community without careful instruction. Thus, it is urged, that access to the Grand Jury minutes is extremely important in this case which stands or falls on the testimony of the informer McFarland.

44/ Tr. 7/19/67, pp. 83-127. Particularly see pp. 110-116.
45/ Tr. 7/19/67, p. 112

The government further urges that the Grand Jury minutes should be kept secret to protect certain innocent accuseds.[46] However, the fact that there were thirteen cases and the Grand Jury returned indictments in only five does not necessarily raise the inference that there are innocent accuseds involved since the other eight cases could have involved crimes committed by the same people as the first five.

Further, and even more important, if in fact there were innocent accuseds involved, this is all the more reason that the testimony should be made available to Taylor since it would support appellant's theory that McFarland was an inveterate liar. That is to say, the only way that there could have been innocent accuseds involved is if McFarland had lied about their involvement in certain crimes. On the other hand, if he had not lied, then it could not fairly be said that they were innocent. Further, the totality of the Grand Jury testimony of McFarland was necessary because it might have tended to prove a common scheme or plan, on the part of McFarland, to avoid indictment of himself by clearing up the record on other outstanding crimes.

V. THE CONDUCT OF THE PROSECUTOR IN THIS CASE WAS IMPROPER

Appellant Taylor will admit that if the summation by the prosecutor

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46/ Brief for Appellee, pp. 17-19

had been "mere advocacy", reversal would not necessarily be warranted.[47] However, in this case the prosecutor went far beyond mere advocacy and began testifying. In fact, not only did he testify, he misrepresented the actual testimony. That is to say, in his closing arguments the prosecutor substituted his own testimony for the testimony of others. This was prejudicial and warrants reversal.

47/ Brief for Appellee, p. 20.

CONCLUSION

Appellant prays that this Court reverse his conviction and remand with instructions to dismiss the indictment, or, in the alternative, to reverse and remand for a new trial and appropriate hearings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Brief have been personally served at the office of the United States Attorney, United States Courthouse, Washington, D.C., this 26th day of September, 1969.

James H. Marsh, Jr.

James H. Marsh, Jr.

"APPENDIX"

1. The following Transcript pages were specifically referred to in the Reply Brief:

Date	Pages
4/25/67	4
7/19/67	61-67 & 83-127
7/20/67	166-168, 263 & 277
7/24/67	111
7/26/67	183, 184 & 187

2. The following Exhibits were specifically referred to in the Reply Brief:

Government Exhibits Nos. 1 & 2